IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 61

C. LEE BUXTON,

Appellant,

v.

ABRAHAM S. ULLMAN, State's Attorney,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF ERRORS OF CONNECTICUT

MOTION FOR LEAVE TO FILE A BRIEF AND BRIEF AS *AMICI CURIAE*

For Doctors Willard Allen, Allan C. Barnes, Robert H. Barter, Ralph C. Benson, Willis E. Brown, Charles Iverson Bryans, Jr., Bayard Carter, Roland Cron, John D. Cross, M. E. Davis, Gordon W. Douglas, R. Gordon Douglas, Nicholas J. Eastman, James H. Ferguson, Stanley T. Garber, George H. Gardner, Arthur L. Haskins, Douglas M. Haynes, Louis M. Hellman, L. L. Hester, R. G. Holly, Carl P. Huber, Edward C. Hughes, W. Nicholas Jones, Irwin H. Kaiser, A. E. Kanter, William C. Keetel, Robert A. Kimbrough, Jr., Kermit Krantz, Ralph E. Leigh, Frank R. Lock,

(continued on inside front cover)

WHITNEY NORTH SEYMOUR,
120 Broadway,
New York 5, N. Y.
Attorney for Amici Curiae

THACHER & BARTLETT,
DAVID GRUSMAN,
Of Counsel.

(Continued from front cover)

Curtis J. Lund, John S. Lyle, John Van Sicklen Maeck, Milton McCall, William J. McGanity, J. L. McKelvey, Charles E. McLennan, T. L. Montgomery, D. G. Morton, Robert E. L. Nesbitt, Jr., Michael Newton, E. Edson Nichols, Ernest W. Page, Langdon Parsons, N. F. Paxson, Franklin L. Payne, Ben Peckham, Mary DeWitt Pettit, Jack Pritchard, Harry Prystowsky, Clyde L. Randall, Duncan E. Reid, Seymour L. Romney, R. A. Ross, Philip C. Schreier, Charles S. Stevenson, Martin L. Stone, E. Steward Taylor, Howard C. Taylor, Richard W. TeLinde, W. N. Thornton, Jr., John Ullery, Frank E. Whitacre, Seward H. Wills, J. Robert Willson.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 61.

C. LEE BUXTON,

Appellant,

v.

ABRAHAM S. ULLMAN, State's Attorney,

Appellee.

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE**

Sixty-six physicians hereby respectfully move for leave to file a brief annexed hereto as *amici curiae* in this case. The written consent of appellant has been obtained. The consent of the appellee was requested but refused.

These physicians are all specialists in the field of obstetrics and gynecology and are leaders in their profession. Their interest in this case arises from the fact that the Connecticut statutes herein involved, under the decision below, have deprived a fellow specialist in obstetrics and gynecology of his right to discharge his professional responsibility and to prescribe effective techniques in the treatment of patients, which have been overwhelmingly approved by the medical profession. Any such legislative encroachment on the practice of medicine threatens the right of all physicians to practice freely their profession. In addition, all of the physicians who seek to submit this

---

* The names of the *amici curiae* who as individuals seek to file a brief are listed, along with the institutions with which they are connected for purposes of identification only, in Appendix A to the annexed brief.

brief as *amici curiae* are also teachers in medical schools. They seek to protect the right of students, and future generations of doctors, to give their patients the benefit of knowledge painstakingly taught in the medical schools.

The short brief which these doctors seek to submit will argue that the right of a physician to treat patients in a manner approved by the consensus of medical opinion is an essential element of a doctor's right to practice his profession free from arbitrary restraints and thus is protected by the Fourteenth Amendment. Under earlier decisions of this Court, a state can proscribe a certain form of treatment only when it is medically dubious. Here, however, the medical correctness of the advice involved is free from doubt.

Below appellant relied primarily on arguments other than protection of his right as a member of the medical profession. Since it is likely that a similar course will be pursued in this Court it is believed that the accompanying brief, which the *amici curiae* are requesting permission to file, will more fully present the position that a legislative prohibition which is unsupported by medical opinion contravenes the Fourteenth Amendment by unreasonably interfering with a doctor's right to practice his profession free from arbitrary restraints. If this principle is established it will not only be dispositive of this case but will emphasize and preserve the public responsibility of the professions.

Dated: August 19, 1960.

Respectfully submitted,

WHITNEY NORTH SEYMOUR,
120 Broadway,
New York 5, N. Y.
Attorney for *Amici Curiae*.

SIMPSON THACHER & BARTLETT,
DONALD ORESMAN,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 61

C. LEE BUXTON,

Appellant,

v.

ABRAHAM S. ULLMAN, State's Attorney,

Appellee.

ON APPEAL FROM THE
SUPREME COURT OF ERRORS OF CONNECTICUT

BRIEF AS *AMICI CURIAE*

For Doctors Willard Allen, Allan C. Barnes, Robert H. Barter, Ralph C. Benson, Willis E. Brown, Charles Iverson Bryans, Jr., Bayard Carter, Roland Cron, John D. Cross, M. E. Davis, Gordon W. Douglas, R. Gordon Douglas, Nicholas J. Eastman, James H. Ferguson, Stanley T. Garber, George H. Gardner, Arthur L. Haskins, Douglas M. Haynes, Louis M. Hellman, L. L. Hester, R. G. Holly, Carl P. Huber, Edward C. Hughes, W. Nicholas Jones, Irwin H. Kaiser, A. E. Kanter, William C. Keetel, Robert A.

(Continued on inside front cover.)

WHITNEY NORTH SEYMOUR,
120 Broadway,
New York 5, N. Y.
Attorney for Amici Curiae.

SIMPSON THACHER & BARTLETT,
DONALD ORESMAN,
Of Counsel.

(*Continued from title page.*)

Kimbrough, Jr., Kermit Krantz, Ralph E. Leigh, Frank R. Lock, Curtis J. Lund, John S. Lyle, John Van Sicklen Maeck, Milton McCall, William J. McGanity, J. L. McKelvey, Charles E. McLennan, T. L. Montgomery, D. G. Morton, Robert E. L. Nesbitt, Jr., Michael Newton, E. Edson Nichols, Ernest W. Page, Langdon Parsons, N. F. Paxson, Franklin L. Payne, Ben Peckham, Mary DeWitt Pettit, Jack Pritchard, Harry Prystowsky, Clyde L. Randall, Duncan E. Reid, Seymour L. Romney, R. A. Ross, Philip C. Schreier, Charles S. Stevenson, Martin L. Stone, E. Steward Taylor, Howard C. Taylor, Richard W. TeLinde, W. N. Thornton, Jr., John Ullery, Frank E. Whitacre, Seward H. Wills, J. Robert Willson.

INDEX.

	PAGE
Statement of Interest	2
Question Presented	3
Statutes Involved	3
Statement of the Case	4
Summary of Argument	5
Argument	6
I. THE CONNECTICUT STATUTES DEPRIVE APPELLANT OF DUE PROCESS OF LAW BY UNREASONABLY INTERFERING WITH HIS PRACTICE OF MEDICINE	6
A. THE RIGHT TO ENGAGE IN A PROFESSION FREE FROM ARBITRARY RESTRAINTS IS PROTECTED BY THE FOURTEENTH AMENDMENT	6
B. THE RIGHT OF A PHYSICIAN TO TREAT PATIENTS IN A MEDICALLY APPROVED MANNER IS AN ESSENTIAL ELEMENT OF HIS RIGHT TO ENGAGE IN HIS PROFESSION	7
C. A STATE CANNOT INTERFERE WITH THE PRACTICE OF MEDICINE BY PROHIBITING A CERTAIN MODE OF TREATMENT UNLESS THE PROSCRIBED TREATMENT IS MEDICALLY UNSUPPORTABLE OR DUBIOUS	11
D. THE ADVISABILITY AND NECESSITY OF THE PROHIBITED TECHNIQUES IN THIS CASE ARE FREE FROM DOUBT	13
Conclusion	15
Appendix A	16

Citations.

CASES: PAGE

Allgeyer v. *Louisiana*, 165 U. S. 578 6

Bates v. *Little Rock*, 361 U. S. 516 13

Buxton v. *Ullman*, 147 Conn. 48, 156 A. 2d 508 ..... 4, 14

Dent v. *West Virginia*, 129 U. S. 114 ..... 6, 9

Everard's Breweries v. *Day*, 265 U. S. 545 ..... 11, 14

Greene v. *McElroy*, 360 U. S. 474 ..... 6, 7

Jacobson v. *Massachusetts*, 197 U. S. 11 ..... 13, 14

Konigsberg v. *State Bar of California*; 353 U. S. 252 6

Lambert v. *Yellowley*, 272 U. S. 581 ..... 11, 12, 14

Peters v. *Hobby*, 349 U. S. 331 6

Schware v. *Board of Bar Examiners*, 353 U. S. 232 6

Sweezy v. *New Hampshire*, 354 U. S. 234 14

Truax v. *Raich*, 239 U. S. 33 6

United States v. *One Package*, 86 F. 2d 737 10

Walden v. *Jones*, 289 Ky. 395, 158 S. W. 2d 609 10

Wieman v. *Updegraff*, 344 U. S. 183 ..... 6, 7

STATUTES:

Section 53-32 of the General Statutes of Connecticut, Revision of 1958 ..... 3, 4

Section 54-196 of the General Statutes of Connecticut, Revision of 1958 ..... 3, 4

OTHER REFERENCES:

15 Encyclopaedia Britannica 197 (14th ed., 1957) 7

Fitts & Fitts, *Ethical Standards of the Medical Profession*, Annals of the American Academy of Political and Social Science, January, 1955 8

American Medical Association, Principles of Medical Ethics 8, 9, 10

Kagan, *Maimonides' Prayer*, Annals of Medical History, vol. 10, n. s., p. 429 (1938) 8

In The

Supreme Court of the United States

October Term, 1960

No. 61

C. Lee Buxton,

Appellant,

v.

Abraham S. Ullman, State's Attorney,

Appellee.

BRIEF AS *AMICI CURIAE*

For Doctors Willard Allen, Allan C. Barnes, Robert H. Barter, Ralph C. Benson, Willis E. Brown, Charles Iverson Bryans, Jr., Bayard Carter, Roland Cron, John D. Cross, M. E. Davis, Gordon W. Douglas, R. Gordon Douglas, Nicholas J. Eastman, James H. Ferguson, Stanley T. Garber, George H. Gardner, Arthur L. Haskins, Douglas M. Haynes, Louis M. Hellman, L. L. Hester, R. G. Holly, Carl P. Huber, Edward C. Hughes, W. Nicholas Jones, Irwin H. Kaiser, A. E. Kanter, William C. Keetel, Robert A. Kimbrough, Jr., Kermit Krantz, Ralph E. Leigh, Frank R. Lock, Curtis J. Lund, John S. Lyle, John Van Sicklen Maeck, Milton McCall, William J. McGanity, J. L. McKelvey, Charles E. McLennan, T. L. Montgomery, D. G. Morton, Robert E. L. Nesbitt, Jr., Michael Newton, E. Edson Nichols, Ernest W. Page, Langdon Parsons, N. F. Paxson, Franklin L. Payne, Ben Peckham, Mary DeWitt Pettit, Jack Pritchard, Harry Prystowsky, Clyde L. Randall, Duncan E. Reid, Seymour L. Romney, R. A. Ross, Philip C. Schreier, Charles S. Stevenson, Martin L. Stone, E. Steward Taylor, Howard C. Taylor, Richard W. TeLinde, W. N. Thornton, Jr., John Ullery, Frank E. Whitacre, Seward H. Wills, J. Robert Willson.

Statement of Interest.

This brief *amici curiae* is filed on behalf of the 66 above-named physicians individually. Their names and the institutions with which they are affiliated are listed for purposes of identification only in Appendix A to this brief. They are specialists in the practice and teaching of obstetrics and gynecology and are leaders in their profession. All of them are heads of departments in the medical schools with which they are affiliated. Several of them are past presidents of the American Gynecological Society, the American Association of Obstetricians and Gynecologists or the College of Obstetrics and Gynecology. Appellant has consented to the filing of this brief. Consent of appellee was requested but refused.

The Connecticut statutes at issue here deprive physicians practicing in obstetrics and gynecology of an important and effective remedy in the treatment of patients. The means proscribed by the statutes have long been endorsed by the overwhelming consensus of medical opinion.

These doctors, on whose behalf this brief is filed, have a profound concern with and seek to establish the right of physicians to fulfill their professional and moral obligations to their patients by employing every means known to medical science and approved by the medical community. A legislative prohibition which is unsupported by medical opinion contravenes the Fourteenth Amendment by unreasonably interfering with a doctor's right to discharge his responsibility to patients by practicing his profession to the best of his ability in conformity with accepted medical standards and by communicating his advice to his patients.

Recognition of this right of the doctor would not interfere with the right of members of the public not to seek his advice or not to follow it when given, for religious or any other reason.

Question Presented.

Whether Section 53-32 and Section 54-196 of the General Statutes of Connecticut, Revision of 1958, are unconstitutional as depriving physicians of their right to practice medicine in accordance with principles generally approved by the medical profession.

Statutes Involved.

Statutes involved in this case are Sections 53-32 and 54-196, General Statutes of Connecticut, Revision of 1958.

Section 53-32, General Statutes of Connecticut, Revision of 1958, provides:

> "**Use of drugs or instruments to prevent conception.** Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or both fined and imprisoned."

Section 54-196, General Statutes of Connecticut, Revision of 1958, provides:

> "**Accessories.** Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender."

Statement of the Case.

Appellant, Dr. C. Lee Buxton, is a licensed physician and a specialist in obstetrics and gynecology. He was formerly a professor at the Columbia-Presbyterian Medical Center in New York and is presently Professor and Chairman of the Department of Obstetrics and Gynecology at the Yale University School of Medicine and a practicing physician associated with the Grace-New Haven Community Hospital. In his capacity as physician of appellants, Jane Doe and Pauline Poe, Dr. Buxton concluded that prescription of techniques designed to prevent future pregnancies was necessary to preserve the health of these patients. Although such treatment is overwhelmingly approved in cases like these, and is freely administered in practically every state in the Union, Dr. Buxton was prevented by Sections 53-32 and 54-196 of the General Statutes of Connecticut, Revision of 1958, from fulfilling the duty he owed his patients. As interpreted by the Connecticut Courts, and by appellee, State's Attorney, the giving of such advice and treatment by him are unlawful.

The Proceedings Below.

Appellant Buxton brought a declaratory judgment action in the state courts, claiming that application of these statutes to him as a practicing physician deprived him of liberty and property without due process of law and thus violated the Fourteenth Amendment of the Constitution of the United States. Appellee demurred to the complaint, and the demurrer was sustained. This holding was affirmed by the Supreme Court of Errors of Connecticut on December 8, 1959, and the opinion is reported at 147 Conn. 48, 156 A. 2d 508.

Summary of Argument.

Appellant's right to practice the profession of medicine, a right protected by the Fourteenth Amendment, is seriously impaired by the Connecticut statutes herein involved. These statutes prevent a physician from fulfilling his duty to his patients because he is unable to utilize fully recognized medical techniques.

Such a prohibition interferes with his professional obligations to his patients, arbitrarily and unreasonably. This Court has indicated that state interferences with the doctor-patient relationship will be viewed as reasonable only where there is a bona fide dispute over conflicting theories of treatment. Since techniques proscribed by the Connecticut statutes have received the approval of the medical community generally, no such dispute exists in this case and the statutes are unconstitutional.

Interference with the doctor-patient relationship at issue here should be distinguished from ordinary economic regulation. The doctor-patient relationship involves deeply rooted obligations requiring the exercise by the physician of all the established skills developed by the medical profession. The doctor should be free to communicate to his patients advice so formulated, and they should not be denied the benefit of receiving it.

ARGUMENT.

I.

The Connecticut statutes deprive appellant of due process of law by unreasonably interfering with his practice of medicine.

A. The right to engage in a profession free from arbitrary restraints is protected by the Fourteenth Amendment.

In *Dent* v. *West Virginia*, 129 U. S. 114, 121 (1889), a case dealing with the practice of medicine, this Court recognized an individual's right to follow a profession of his choosing and in *Truax* v. *Raich*, 239 U. S. 33, 41 (1915), the right to work was characterized as "the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure." See also *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589 (1897).

As the right to engage in an occupation is protected by the Fourteenth Amendment, an individual cannot be excluded from such occupation for reasons that contravene due process. *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 238-39 (1957); *Konigsberg* v. *State Bar of California*, 353 U. S. 252, 257-258 (1957). *Cf. Wieman* v. *Updegraff*, 344 U. S. 183, 191-192 (1952); *Peters* v. *Hobby*, 349 U. S. 331, 352 (1955) (concurring opinion).

The Court recently reaffirmed this position in *Greene* v. *McElroy*, 360 U. S. 474, 492 (1959), when it stated that "the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment."

B. The right of a physician to treat patients in a medically approved manner is an essential element of his right to engage in his profession.

A state need not totally exclude an individual from a profession in order to violate due process. "Unreasonable interference" is also within the constitutional prohibition. *Cf. Greene* v. *McElroy*, 360 U. S. 474, 492 (1959); *Wieman* v. *Updegraff*, 344 U. S. 183 (1952).

The statutes involved in this case interfere in a crucial manner with the doctor's right to practice. They prevent him from saving the life and preserving the health of some of his patients. Although a recognized medical course is available, the statute prevents him from providing it, thwarting the performance of the physician's historic duty and materially impairing his professional effectiveness. The doctor's position in our society is unique. He is charged with the highest responsibility, both legal and moral, to care for the welfare of the sick and infirm in conformity with tested medical advances. As he leaves medical school he is generally required to take the ancient vow of Hippocrates, which provides in part:

> "The regimen I adopt shall be for the benefit of my patients according to my ability and judgment. . . . Whatsoever house I enter, there will I go for the benefit of the sick. . . ." (Reprinted in 15 Encyclopaedia Britannica 197, 14th ed., 1957.)

Physicians throughout history have recognized a sacred obligation to their patients. More than 800 years ago the philosopher and scholar Maimonides, who was also a practicing physician, expressed the doctor's responsibility to increase his knowledge and use such knowledge to aid his patients in the famous prayer he uttered before starting his daily medical rounds:

"I begin once more my daily work. Be Thou with me, Almighty Father of Mercy, in all my efforts to heal the sick. For without Thee, man is but a helpless creature. Grant that I may be filled with love for my art and for my fellow-men. May the thirst for gain and the desire for fame be far from my heart. For these are the enemies of Pity and the ministers of Hate. Grant that I may be able to devote myself, body and soul to Thy children who suffer from pain. Preserve my strength, that I may be able to restore the strength of the sick and the poor, the good and the bad, the friend and the foe. Let me see in the sufferer the man alone. When wiser men teach me, let me be humble to learn; for the mind of man is so puny; and the art of healing is so vast. But when fools are ready to advise me or to find fault with me, let me not listen to their folly. Let me be intent upon one thing, O Father of Mercy, to be always merciful to Thy suffering children.

"May there never rise in me the notion that I know enough, but give me strength and leisure and zeal to enlarge my knowledge. Our work is great, and the mind of man presses forward forever. Thou hast chosen in Thy grace, to watch over the life and death of Thy creature. I am about to fulfill my duties, guide me in this immense work so that it may be of avail." (Reprinted in Kagan, *Maimonides' Prayer,* Annals of Medical History, vol. 10, n.s.; p. 429, 1938.)

The medical community has constantly striven to protect the patient by urging doctors to follow scientific principles only. Chapter 1, §2 of the Principles of Medical Ethics of the American Medical Association adopted in 1953 (reprinted in Fitts & Fitts, *Ethical Standards of the Medical Profession,* Annals of the American Academy of Political and Social Science, January, 1955), provided:

"In order that a physician may best serve his patients, he is expected to exalt the standards of his profession and to extend its sphere of usefulness. To the same end, he should not base his practice on an exclusive dogma or a sectarian system for 'sects are implacable despots; to accept their thralldom is to take away all liberty from one's action and thought.' A sectarian or cultist as applied to medicine is one who alleges to follow or in his practice follows a dogma, tenet or principle based on the authority of its promulgator to the exclusion of demonstration and scientific experience."

Section 3 of the current Principles of Medical Ethics distributed by the American Medical Association continues to urge a "scientific approach":

"A physician should practice a method of healing founded on a scientific basis; and he should not voluntarily associate professionally with anyone who violates this principle."

Courts, as well as scholars, have recognized the responsibility of the physician. In *Dent* v. *West Virginia*, 129 U. S. 114, this Court stated:

"Few professions require more careful preparation by one who seeks to enter it than that of medicine. It has to deal with all those subtle and mysterious influences upon which health and life depend, and requires not only a knowledge of the properties of vegetable and mineral substances, but of the human body in all its complicated parts, and their relation to each other, as well as their influence upon the mind. The physician must be able to detect readily the presence of disease, and prescribe appropriate remedies for its removal. Every one may have occasion to consult him, but comparatively few can judge of the qualifications of learning and skill which he possesses." (at p. 122)

In *United States* v. *One Package*, 86 F. 2d 737 (2 Cir., 1936), the Court avoided a constitutional argument by construing the Tariff Act of 1930 as not applying to birth control devices mailed to a physician. The Act could not apply, thought the Court, to prevent the importation, sale or carriage by mail of things which might "intelligently be employed by conscientious and competent physicians for the purpose of saving life or promoting the well-being of their patients." (at p. 739)

Not only have the courts recognized the physician's duty to his patients but they have placed an affirmative obligation upon him to exercise his skill. See *Walden* v. *Jones*, 289 Ky. 395, 158 S. W. 2d 609 (1942).

The fact that the Connecticut statutes may immunize doctors in that state from malpractice suits based on their failure to recommend prohibited techniques is of no moment. They do not and cannot immunize a doctor from the demoralizing realization that he is required by law to fail to live up to the standards of his profession and to neglect the welfare of his patients. They cannot obscure the fact that they have struck a sharp blow at individual professional responsibility. The state cannot thus intrude upon a physician's moral and professional obligation to preserve the life and health of his patients, a matter for which his exclusive franchise makes him, and not the state, responsible. The Principles of Medical Ethics currently distributed by the American Medical Association stress his personal responsibility to his patients:

> "SECTION 1. The principal objective of the medical profession is to render service to humanity with full respect for the dignity of man. Physicians should merit the confidence of patients entrusted to their care, rendering to each a full measure of service and devotion.
>
> • • •

"SECTION 2. Physicians should strive continually to improve medical knowledge and skill, and should make available to their patients and colleagues the benefits of their professional attainments.

* * *

"SECTION 6. A physician should not dispose of his services under terms or conditions which tend to interfere with or impair the free and complete exercise of his medical judgment and skill or tend to cause a deterioration of the quality of medical care."

Only the most compelling necessities, clearly within the range of the police power, could possibly justify a statute which interferes so seriously with the profoundest obligations of the medical profession.

C. A state cannot interfere with the practice of medicine by prohibiting a certain mode of treatment unless the proscribed treatment is medically unsupportable or dubious.

State statutes interfering with the practice of medicine have been upheld by this Court only when the treatment prohibited by the legislature has not been approved by medical opinion generally.

In *Everard's Breweries* v. *Day*, 265 U. S. 545 (1924), where the Court upheld the constitutionality of a statute preventing doctors from prescribing malt liquors, it pointed out that "There is no consensus of opinion among physicians and medical authorities that they have any substantial value as medicinal agents; and while there is some difference of opinion on this subject the question is, at the most, debatable." (at p. 562)

That the *Everard's* case turned on the lack of agreement in medical circles is reinforced by the view of that case expressed by Mr. Justice Brandeis in *Lambert* v. *Yellowley*, 272 U. S. 581 (1926):

> "The Court further held that Congress must be regarded as having concluded—as it well might do in the absence of any consensus of opinion among physicians and in the presence of the absolute prohibition in many of the States—that malt liquor has no substantial medicinal qualities making its prescription necessary; and that this made it impossible to say the provision was an unreasonable and arbitrary exercise of power." (at p. 594)

The *Lambert* case itself indicates that a doctor's right to prescribe proper treatment can be limited only when the treatment is dubious and not when it represents the consensus of medical opinion. In that case, a physician challenged the constitutionality of a provision of the National Prohibition Act which limited the quantity of spirituous liquors which a doctor was permitted to prescribe. He claimed that "to treat the diseases of his patients and to promote their physical well-being, according to the untrammeled exercise of his best skill and scientifically trained judgment, and, to that end, to advise the use of such machines and medical treatment as in his opinion are best calculated to effect their cure and establish their health, is an essential part of his constitutional rights as a physician." The Court upheld the constitutionality of the statute on the ground that the medical profession had not approved the use of spirituous liquor as proper treatment. Mr. Justice Brandeis noted that Lambert's "belief in the medicinal value of such liquor is not of controlling significance; it merely places him in what was shown . . . to be the minor fraction of his profession," (at p. 596) and that "high medical authority" was in conflict as to the medicinal value of spirituous and vinous liquors. (at p. 597)

A somewhat similar case was *Jacobson* v. *Massachusetts*, 197 U. S. 11 (1905). While the physician's right to practice his profession free from unreasonable interference was not involved, the case upheld a state's right to prescribe a certain form of medication or treatment when it had overwhelming professional support. The Court emphasized that the consensus of medical opinion had favored smallpox vaccination "for nearly a century" (at pp. 23-24). In *Bates* v. *Little Rock*, 361 U. S. 516, 524 (1960), *Jacobson* was cited by this Court not as supporting the police power of the state but for the proposition that "where there is a significant encroachment upon personal liberty, the state may prevail only upon showing a subordinating interest which is compelling."

This Court has sustained only those regulations which, in effect, allowed the regulating body to choose among competing medical theories. In such cases, a physician cannot be said to be inexorably constrained by professional duty to follow the course with which the state seeks to interfere. But where professional opinion leaves no such choice and the legislative body unreasonably forbids full discharge of professional obligation, the legislation interferes inadmissibly not only with the right to practice a profession but with the concomitant right to communicate to patients the opinion and advice of the physician. By the same token, it prevents patients from receiving the advice. Of course, those who for religious or other reasons do not wish to obtain such advice or wish to disregard it are completely free to do so.

D. The advisability and necessity of the prohibited techniques in this case are free from doubt.

The medical authorities supporting the advice which plaintiff should give are extensively reviewed, we have

been advised, both in appellants' briefs and in the brief *amicus* proposed to be filed on behalf of the Planned Parenthood Federation of America, Inc. The unsatisfactory nature of other preventive measures which have been suggested, in light of medical knowledge, is set forth in those briefs. Indeed, it stands admitted on this record. The complaint alleged:

> "8. Medically speaking, the use of such articles, drugs and instruments is indicated as the best and safest preventive measure necessary for the protection and preservation of the life and health of said patient."

On familiar principles, the demurrer admitted these conclusions of fact. *Buxton* v. *Ullman*, 147 Conn. 48, 156 A. 2d 508, 512 (1959).

No controversy in responsible medical opinion over the advisability of the treatment, such as that present in *Everard's Breweries*, *Lambert* or *Jacobson*, exists here. The Connecticut statutes prevent appellant from administering, or even advising about, techniques which may be necessary to protect the health and save the lives of his patients.

In *Sweezy* v. *New Hampshire*, 354 U. S. 234 (1957), this Court stressed the importance of preserving our basic freedoms in the quest for knowledge:

> "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." (at p. 250)

It would be ironic if the freedom to conquer new frontiers in medicine were jealously guarded but the duty of physicians to give the public the benefits of such profes-

sional conquests were to be subject to legislative whims. Professions which are to be bold and which are to observe maximum public responsibility must be as free as possible to obey professional conscience and should not be merely put in the same category as the butcher, the baker and the candlestick maker.

Conclusion.

The judgment of the Supreme Court of Errors of Connecticut should be reversed.

Respectfully submitted,

WHITNEY NORTH SEYMOUR,
120 Broadway,
New York 5, N. Y.
Attorney for *Amici Curiae.*

SIMPSON THACHER & BARTLETT,
DONALD ORESMAN,
Of Counsel.

APPENDIX A

Names of *amici curiae*. (The institutions with which they are affiliated are listed for purposes of identification only.)

WILLARD ALLEN, M.D.
(Washington University School of Medicine, St. Louis, Mo.)

ALLAN C. BARNES, M.D.
(Western Reserve University School of Medicine, Cleveland, Ohio)

ROBERT H. BARTER, M.D.
(George Washington University School of Medicine, Washington, D. C.)

RALPH C. BENSON, M.D.
(University of Oregon Medical School, Portland, Ore.)

WILLIS E. BROWN, M.D.
(University of Arkansas School of Medicine, Little Rock, Ark.)

CHARLES IVERSON BRYANS, JR., M.D.
(Medical College of Georgia, Augusta, Ga.)

BAYARD CARTER, M.D.
(Duke University School of Medicine, Durham, N. C.)

ROLAND CRON, M.D.
(Marquette University School of Medicine, Milwaukee, Wis.)

JOHN D. CROSS, M.D.
(Emory University School of Medicine, Atlanta, Ga.)

M. E. DAVIS, M.D.
(University of Chicago School of Medicine, Chicago, Ill.)

GORDON W. DOUGLAS, M.D.
(New York University School of Medicine, New York, N. Y.)

R. GORDON DOUGLAS, M.D.
(Cornell University Medical College, New York, N. Y.)

NICHOLAS J. EASTMAN, M.D.
(Johns Hopkins University School of Medicine, Baltimore, Md.)

JAMES H. FERGUSON, M.D.
(University of Miami School of Medicine, Coral Gables, Fla.)

STANLEY T. GARBER, M.D.
(University of Cincinnati College of Medicine, Cincinnati, Ohio)

GEORGE H. GARDNER, M.D.
(Northwestern University Medical College, Chicago, Ill.)

ARTHUR L. HASKINS, M.D.
(University of Maryland School of Medicine, Baltimore, Md.)

DOUGLAS M. HAYNES, M.D.
(University of Louisville School of Medicine, Louisville, Ky.)

LOUIS M. HELLMAN, M.D.
(State University of New York, Downstate Medical Center College of Medicine, Brooklyn, N. Y.)

L. L. HESTER, M.D.
(Medical College of South Carolina, Charleston, S. C.)

R. G. HOLLY, M.D.
(University of Nebraska College of Medicine, Omaha, Neb.)

CARL P. HUBER, M.D.
(Indiana University School of Medicine, Indianapolis, Ind.)

EDWARD C. HUGHES, M.D.
(State University of New York, Upstate Medical Center College of Medicine, Syracuse, N. Y.)

W. NICHOLAS JONES, M.D.
(Medical College of Alabama, Birmingham, Ala.)

IRWIN H. KAISER, M.D.
(University of Utah College of Medicine, Salt Lake City, Utah)

A. E. KANTER, M.D.
(Chicago Medical School, Chicago, Ill.)

WILLIAM C. KEETEL, M.D.
(State University of Iowa College of Medicine, Iowa City, Iowa)

ROBERT A. KIMBROUGH, JR., M.D.
(Postgraduate School of Medicine, University of Pennsylvania, Philadelphia, Pa.)

KERMIT KRANTZ, M.D.
(University of Kansas School of Medicine, Kansas City, Kan.)

RALPH E. LEIGH, M.D.
(University of North Dakota School of Medicine, Grand Forks, N. D.)

FRANK R. LOCK, M.D.
(Bowman Gray School of Medicine, Winston Salem, N. C.)

CURTIS J. LUND, M.D.
(University of Rochester School of Medicine, Rochester, N. Y.)

JOHN S. LYLE, M.D.
(Dartmouth Medical School, Hanover, N. H.)

JOHN VAN SICKLEN MAECK, M.D.
(University of Vermont College of Medicine, Burlington, Vt.)

MILTON MCCALL, M.D.
(University of Pittsburgh School of Medicine, Pittsburgh, Pa.)

WILLIAM J. MCGANITY, M.D.
(University of Texas Medical Branch, Galveston, Texas)

J. L. MCKELVEY, M.D.
(University of Minnesota Medical School, Minneapolis, Minn.)

CHARLES E. MCLENNAN, M.D.
(Stanford University School of Medicine, Stanford, Calif.)

T. L. MONTGOMERY, M.D.
(Jefferson Medical College of Philadelphia, Philadelphia, Pa.)

D. G. MORTON, M.D.
(University of California School of Medicine, Los Angeles, Calif.)

ROBERT E. L. NESBITT, JR., M.D.
(Albany Medical College of Union University, Albany, N. Y.)

MICHAEL NEWTON, M.D.
(University of Mississippi School of Medicine, Jackson, Miss.)

E. EDSON NICHOLS, M.D.
(College of Medical Evangelists School of Medicine, Los Angeles, Calif.)

ERNEST W. PAGE, M.D.
(University of California School of Medicine, San Francisco, Calif.)

LANGDON PARSONS, M.D.
(Boston University School of Medicine, Boston, Mass.)

N. F. PAXSON, M.D.
(Hahnemann Medical College, Philadelphia, Pa.)

FRANKLIN L. PAYNE, M.D.
(University of Pennsylvania School of Medicine, Philadelphia, Pa.)

BEN PECKHAM, M.D.
(University of Wisconsin, Madison, Wis.)

MARY DEWITT PETTIT, M.D.
(Woman's Medical College of Pennsylvania, Philadelphia, Pa.)

JACK PRITCHARD, M.D.
(University of Texas Southwestern Medical School, Dallas, Texas)

HARRY PRYSTOWSKY, M.D.
(University of Florida School of Medicine, Gainesville, Fla.)

CLYDE L. RANDALL, M.D.
(University of Buffalo, Buffalo, N. Y.)

DUNCAN E. REID, M.D.
(Harvard Medical School, Boston, Mass.)

SEYMOUR L. ROMNEY, M.D.
(Albert Einstein College of Medicine of Yeshiva University, New York, N. Y.)

R. A. ROSS, M.D.
(University of North Carolina School of Medicine, Chapel Hill, N. C.)

PHILIP C. SCHREIER, M.D.
(University of Tennessee College of Medicine, Memphis, Tenn.)

CHARLES S. STEVENSON, M.D.
(Wayne State University College of Medicine, Detroit, Mich.)

MARTIN L. STONE, M.D.
(New York Medical College, New York, N. Y.)

E. STEWARD TAYLOR, M.D.
(University of Colorado School of Medicine, Denver, Col.)

HOWARD C. TAYLOR, M.D.
(Columbia University College of Physicians & Surgeons, New York, N. Y.)

RICHARD W. TELINDE, M.D.
(Johns Hopkins University School of Medicine, Baltimore, Md.)

W. N. THORNTON, JR., M.D.
(University of Virginia School of Medicine, Charlottesville, Va.)

JOHN ULLERY, M.D.
(Ohio State University College of Medicine, Columbus, Ohio)

FRANK E. WHITACRE, M.D.
(Vanderbilt University School of Medicine, Nashville, Tenn.)

SEWARD H. WILLS, M.D.
(Baylor University College of Medicine, Houston, Texas)

J. ROBERT WILLSON, M.D.
(Temple University School of Medicine, Philadelphia, Pa.)